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SUPREME COURT OF THE UNITED STATES

MAY TERM, 1947.

No.

CHARLES A. KERSTEN, an individual, doing business as KERSTEN MOTOR COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner seeks a review of a decision of the Circuit Court of Appeals for the Tenth Circuit, affirming a judgment of conviction by the District Court of the United States for the District of Colorado, and contends that he has been deprived of the right existing under the Fifth Amendment to the United States Constitution, denying this Petitioner due process of law, and upholding his conviction under a law which has expired by its terms.

Petitioner was convicted under three counts of an information which originally contained 33 counts charging violations of the "Emergency Price Control Act of 1942, as amended, and Stabilization Act of 1944, and Maximum Price Regulation No. 540, as amended" (R.44).

On appeal to the Circuit Court of Appeals for the Tenth Circuit, the judgment of the District Court was affirmed in an opinion dated May 6, 1947 (R.219).

On the first count appellant was sentenced to serve six months in the county jail; to serve three months and pay a fine of $500.00 on the second count; and to pay a fine of $1,000.00 on the third count (R.44).

STATEMENT OF FACTS.

When defendant went to trial 28 counts of the information had been disposed of and only five counts remained. The jury acquitted him on two of these and separate verdicts of guilty as to the other three were returned (R.38).

The offense charged under each count involved the sale of a used passenger automobile above the ceiling price "in violation of Emergency Price Control Act of 1942, as amended, and Stabilization Extension Act of 1944, and Maximum Price Regulation No. 540, as amended, MPR 594" (R.8).

The conduct charged was similar in all three cases. The proof, including exhibits of the prosecution as well as the defense, were the same except as to the dates, names of purchasers, and the identity of the cars involved in the transactions.

In Count 1, one Fishencord went to Petitioner's used car lot in Denver on June 20, 1946, and discussed the purchase of a 1941 Chevrolet Coupe (R.55). This was before the expiration of the Emergency Price Control Act of 1942, as amended, and the date renders the questions involved in this count different from those in Counts 9 and 20.

Fishencord testified that the price quoted on the first trip was $1,600.00. He returned the next day with a friend, one Emery. Both testified that after discussing the price

with Petitioner the latter said: "Here is the keys. Go and take it out for a test run and you can have it for $1,575" (R.55).

While away they procured money and returned to close the deal. Fishencord said that he paid $1,575 in cash and Emery confirmed the statement with the assertion that he counted the money before it was delivered to Petitioner (R. 55, 63).

The complaining witness identified certain documents which were received in evidence as exhibits without objection. Exhibits on similar forms were likewise offered as to the other two sales on which convictions were returned. Two of the exhibits offered by Petitioner, in each instance, duplicated the Government's exhibits, the only differences between them involving the amounts and the descriptions of the cars and the signatures thereon.

Exhibit 1 is the usual Colorado Certificate of Title, which is issued by the State Revenue Director. This is dated June 27, 1946, and certifies that a 1941 Model Chevrolet purchased from the Kersten Motor Company belongs to Elliott Ray Fishencord (R.164).

Exhibit 2 is a Dealer's Warranty, which describes the same automobile. It recites, among other things: "Our normal charge is not in excess of OPA ceilings." It gives the total selling price as $1,048.00 and is signed, Kersten Motor Company, and the name of the agent making the sale is given as H. J. Winkler (R.164).

Exhibit 2 is identical with the Government's Exhibit A except that Petitioner's exhibit carries the signature of Fishencord.

Exhibit 3 entitled "Sales Agreement and Receipt" is identical with Petitioner's Exhibit B, except again that in Petitioner's exhibit the signature of Elliott Ray Fishencord appears in two places.

Among other things Exhibit 3 said the following:

"To Kersten Motor Company, Seller

The undersigned hereby purchases from you * * *

For which I agree to pay the sum of	$1048.00	
Sales Tax	20.96	
Total bona fide cash purchase price	1068.96	
Cash on delivery	1068.96	(R.166)

"It is understood that this agreement represents the complete and exclusive contract of the parties hereto * * *" (The instrument is signed at this place by both parties.) "The undersigned hereby certify that the amount set forth in the within agreement as deposit and 'cash on delivery' have been paid * * *; and I (or we) have not made and do not intend to make any collateral or outside agreement in connection with the purchase of this article * * *" (It is signed again by both parties at the end.) (R.167)

On cross-examination the purchaser, Fishencord, identified his signatures and agreed that the statements "Total selling price $1,048" and "Total bona fide cash purchase price $1,068.96" were contained in the instruments. Fishencord claimed that he knew nothing about ceiling prices at the time he made the purchase (R. 61, 62).

Emery said that he did not know what the ceiling price was (R. 65, 66).

Petitioner testified that he has lived in Denver since 1938 and has been in the automobile business here since the early part of 1943. Fishencord came in and looked at the car and drove it around but no price was talked at the first meeting. He came back later with Mr. Emery. The latter wanted to know about the condition of the car. According to Petitioner there was a sticker, according to OPA forms, on the car giving the ceiling price as $1,048.00. When they decided to make the deal, Petitioner said that he tore the sticker off the window and handed it to Fishencord and told

him to take it to the bookkeeper. After Emery asked about another car, Petitioner and Fishencord went into the office alone.

Fishencord handed Petitioner $1,050, and then after asking about the state sales tax paid $20.00 more. Kersten denied that Emery counted the money (R. 123-125; 134-136).

Petitioner saw Fishencord sign the Government's Exhibits A and B showing the price as $1,048 and the total sale price, including sales tax, as $1,068.96 (R.125).

Count 9 involved the purchase of a Model 1941 4-door Chrysler car by Mrs. Josie Mast on August 10, 1946. This was about six weeks after the 1942 Act, as amended, had expired. She claimed that she paid a total of $1,580.00, consisting of $100 deposited when she first looked at an Oldsmobile and $650 paid at the time of the delivery of the Chrysler automobile with the remainder coming from a loan negotiated by the Aetna Loan Company and secured by a chattel mortgage on the car (R.75-77).

The evidence showed further that Mrs. Mast signed and received instruments stating: "Total selling price $1350"; "For which I agree to pay $1350; Sales Tax $31.82. Total bona fide cash purchase price $1381.82, Payable as follows: Deposit $100, cash on Delivery $451.82 and Deferred balance $830. Deferred payment charges including the cost of insurance, if any, $241. Total deferred balance $1071" (R.204).

Mrs. Mast identified Exhibits Q and R which reflected a first deposit of $100 and a further payment of $451.82 instead of $110 and $650, respectively, as she claimed in her oral examination. She admitted signing both of them (R. 82, 83). They are receipts given her at the time she looked at the Oldsmobile and later when she bought the Chrysler. She took home a yellow original and a blue carbon copy was retained by the seller (R.80).

The third count upon which a verdict of guilty was found was Count 20, involving the sale on August 12, 1946, to Arthur Kemper, an automobile mechanic of Littleton, Colorado, of a 1946 Cheverolet for $2,450.00. Kemper claimed that he paid $700 in cash to Petitioner on August 9, 1946;

$700 to Mr. Middleton, a representative of Kersten, on August 12th; and $1,050 by check from The Aetna Loan Company (R.103-105).

This witness likewise admitted the execution of similar instruments reciting facts contrary to his oral testimony as to the price. He signed Government's Exhibit 26 containing the words "Total selling price $1160." He signed twice on Government's Exhibit 27 showing that he agreed to pay $1,160, plus sales tax of $23.20, making a total bona fide cash price of $1,183.20 (R. 111, 112).

Petitioner admitted the first conversation with Kemper. He had nothing more to do with the sale. However, he identified Kemper's signatures on the various documents which show the amounts and totals utterly contradictory to Kemper's oral assertions on the trial (R.132-134).

In every instance the complaining witness, in at least three or four places, signed his name to the papers which were executed in connection with each sale setting forth facts contrary to his testimony upon the witness stand.

Objections were also made during the course of the trial to the admission of any evidence as to the charges of offenses committed subsequent to June 30, 1946, the date of the expiration, by their terms, of the Emergency Price Control Act, as amended, and the Stabilization Act, as amended. These objections were overruled (R. 74, 104).

JURISDICTION.

The Petitioner says that the Supreme Court of the United States has jurisdiction to review this cause on certiorari, because:

1. It is an appeal from a conviction in a District Court of the United States wherein the judgment has been affirmed by a Circuit Court;

2. That it involves the question of the denial of the right of a defendant to due process of law under the Fifth Amendment to the Constitution, because:

(a) On two of the three counts (Nos. 9 and 20) he was charged with the violation of a law which had expired

by its terms prior to the time of the conduct complained against;

(b) Because on the other Count (No. 1) Petitioner was convicted of the violation of a law which had expired by its terms before the Information was filed and when there was no sufficient saving clause contained in the law to preserve the right to prosecute thereafter;

(c) Because the Circuit Court held that the Emergency Price Control Act of 1942, as amended, was extended by the Price Control Extension Act of July 25, 1946, when the 1942 Act, as amended, had expired by its terms on June 30, 1946; and

(d) If Petitioner's conduct in August, 1946, constituted a violation of any act, it must have been the new Act of July 25, 1946, because he could not have violated a law which had expired by its terms.

QUESTIONS PRESENTED.

1. Will a conviction under an Information charging a violation of an act which had expired by its terms be sustained when the conduct complained against was committed between five and six weeks after the date of such expiration?

2. Will an affirmance of that judgment of conviction be sustained on the ground that the Price Control Extension Act of July 25, 1946, constituted an extension of the Emergency Price Control Act of 1942, as amended, although an hiatus is recognized and provided for in the new act as to violations, civil and criminal, between the date of the expiration of the prior act and the passage of the new one?

3. Will this Court affirm a conviction under a law which expired by its terms on June 30, 1946, when no proper saving clause was contained in the act to justify prosecution thereafter?

REASONS RELIED UPON FOR ALLOWANCE OF A WRIT OF CERTIORARI.

The reasons relied on for the allowance of a Writ of Certiorari are as follows:

1. By sustaining a conviction for conduct in August, 1946, under the Emergency Price Control Act of 1942, as amended, which Act, under its terms, had expired on June 30, 1946, the Petitioner would be deprived of his liberty and property without due process of law under the Fifth Amendment to the Constitution, for that he would be punished for violating a law which had ceased to exist;

2. By sustaining such conviction on the ground that the Emergency Price Control Act of 1942, as amended, was extended so as to be effective after July 25, 1946, upon the passage of the Price Control Extension Act of July 25, 1946, Petitioner would be deprived of his liberty and property without due process of law for the reason that no law existed with respect to such violation at the date of his alleged misconduct;

3. By sustaining a conviction under an Information under a law which had expired, by its terms, for acts committed after such expiration when no proper saving clause was contained in the law, Petitioner would be denied due process of law.

WHEREFORE, because of the importance of the questions involved and for the reasons hereinabove set forth, your Petitioner respectfully prays that Writ of Certiorari be issued out of and under the seal of this Court directed to the Circuit Court of the Tenth Circuit of the United States, commanding said Court to secure and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings of that Court in the case of your Petitioner which was therein entitled Charles A. Kersten, an individual, doing business as Kersten Motor Company, vs. United States of America, No. 3485, to the end that said cause may be reviewed and determined by this Court as provided by Section 237 of

the Judicial Code, as amended by the Act of February 13, 1925, and the Rules of this Court, and that your Petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate and in conformity with the provisions of said Code and the Rules of this Court, and that the Judgment of the Circuit Court of Appeals for the United States be reversed.

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Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS OF COURTS BELOW

The judgment of the United States District Court for the District of Colorado has not been officially reported but is found at page 44 of the Record.

The judgment of the Circuit Court of Appeals for the Tenth Circuit has, likewise, not been officially reported, but may be found at page 234 of the Record.

JURISDICTION.

Jurisdiction is invoked under Section 237 of the Judicial Code (28 U.S.C.A. 344-b).

Petitioner's argument on the questions raised falls, for the most part, under two definite headings. The offense charged in Count I was alleged to have been committed when the law which it was asserted was violated by such misconduct was still in force. Counts 9 and 20 involve conduct after that law expired by its terms.

As to Count 1, Petitioner asserts that there was no saving clause in the Emergency Price Control Act of 1942, as amended, which would justify the filing of an information thereunder subsequent to the date of its expiration.

As to the other two counts, Petitioner contends that when the law ceased to exist on June 30, 1946, and the period from that date until July 25, 1946, when the Price Control Extension Act was enacted was expressly recognized as being a period during which no violation might occur, that a new law came into existence and the expired law was not extended so as to cover acts committed in August, 1946.

ARGUMENT

The argument in this brief will be presented under the following specified headings:

1. Offenses charged in August, 1946, did not violate the Emergency Price Control Act of 1942, as amended;

2. The saving clause in the Emergency Price Control Act of 1942, as amended, does not justify prosecution under Count 1.

1. OFFENSES CHARGED IN AUGUST, 1946, DID NOT VIOLATE THE EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED.

During the trial, counsel for Petitioner objected repeatedly to the admission of evidence on Counts 9 and 20 for the reason that no law existed at the date of the alleged misconduct in either case under which Petitioner could be tried. These objections were overruled. These matters were again presented to the Circuit Court of Appeals and the judgment of conviction was there affirmed.

The Circuit Court opinion says: "By the Price Control Extension Act of 1946, the Emergency Price Control Act of 1942, was extended to June 30, 1947." After stating that the Congress may revive or extend an act by any form of words which makes clear its intention to do so, the Circuit Court says: "There can be no doubt that Congress intended the penal provisions of the Emergency Price Control Act of 1942 to be extended and remain in force except as to act, omission or failure to act occurring between June 30, 1946 and July 25, 1946."

It is then said that "By Sec. 18, supra, Maximum Price Regulations 540 and 594 as amended, were put into effect retroactively from June 30, 1946, except as to violations occurring between June 30, 1946 and July 25, 1946."

It is Petitioner's contention that the Price Control Extension Act of July 25, 1946, was a new law. That Congress recognized and intended it as such is reflected by the facts that Section 17 provides "This Act may be cited as Price Control Extension Act of 1946"; that it provided that no act, or transaction, or omission, or failure to act, occurring subsequent to June 30, 1946, and prior to the date of the *enactment of this Act* shall be deemed a violation of the Emergency Price Control Act of 1942, as amended * * * "; and by providing in Section 18 that "The provisions of this Act shall take effect as of June 30, 1946."

When the car sales charged in the information in August, 1946, took place, there was a new law in existence and if any prosecution were justified because of those trans-

actions it must have been under the provisions of the Price Control Extension Act of 1946. However, that law was not mentioned in the Information and the entire conduct of the case, according to the theory of the Government and the Trial Court, was that the Information charged, and Appellant was tried for a violation of, the Emergency Price Control Act of 1942, as Amended, and the regulations adopted pursuant thereto.

An analysis of the Act of July 25, 1946, reveals that fourteen of its eighteen provisions are amendments of the Old Emergency Price Control Act of 1942, as Amended, and the Stabilization Act of 1942, as Amended. The other four sections are new. They expressly announce a decontrol policy, provide for recommendations by the President to the Congress, require a decontrol of non-agricultural commodities, provide for a Decontrol Board, and expressly exclude from the decontrol provisions of the acts certain commodities, such as cotton and sugar.

The mere fact that the old rules and regulations promulgated thereto, were in effect in August, 1946, does not argue that they were in effect as a part of the law under which Appellant was charged and tried.

They were in effect by reason of the action of the Congress on July 25, 1946, when it enacted a new law and incorporated certain sections of a dead law into the new Act by reference. The force and effect of the provisions and the rules and regulations so referred to and made a part of the new law are derived from the Act of Congress in July, 1946, and do not have the effect of reviving the law of 1942, as Amended. The fact that those same provisions appeared in the old law is no argument in favor of this Information and the conviction thereunder.

Zoline's Federal Criminal Law and Procedure, Volume 1, Section 139, says:

> "The sufficiency of an indictment must, in large part, be tested by the fact as to whether it accurately advises the defendant, as well as the Court, of the acts of which the former is accused. There are two

principles by which it may be determined whether the accused has been informed of the nature of the accusation within the meaning of the Constitution; first, that is must be sufficiently certain to enable him to plead jeopardy in a subsequent indictment, and, second, that it must be sufficiently certain as a pleading to enable him to make his defense."

The same author says in Section 159 and Section 160 of the same work:

"Sec. 159. No Federal Constructive Offenses.

"It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under a statute unless clearly within its terms. There can be no constructive offenses, and, before a man can be punished, his case must be plainly and unmistakably within the statues."

"Sec. 160. Indictment Must Bring the Defendant Within the Precise Terms of the Statute.

"Where the crime is a statutory one, it must be charged with precision and certainty, and every indictment of which it is composed must be clearly and accurately set forth; and that even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense to be charged."

In the case of *Todd v. United States*, 158 U. S. 278 at 282, Mr. Justice Brewer followed this text and said:

"It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. 'There can be no constructive offensees, and before a man can be punished, his case must be plainly and unmistakably within the statute.' United States v. Lacher, 134 U. S. 624; Endlich on the Interpretation of Statutes,

sec. 329, 2d ed.; Pomeroy's Sedgwick on Statutory and Constitutional Construction, 280."

In *United States v. Bathgate,* 246 U. S. 220 at page 226, Mr. Justice McReynolds, in discussing a charge of bribery, in connection with elections, said:

> "Section 19, Criminal Code, of course, now has the same meaning as when first enacted as § 6, Act of 1870 (see Criminal Code, §§ 339, 341); and considering the policy of Congress not to interfere with elections within a State except by clear and specific provisions, together with the rule respecting construction of criminal statutes, we cannot think it was intended to apply to conspiracies to bribe voters. Bribery, expressly denounced in another section of the original act, is not clearly within the words used; and the reasoning relied on to extend them thereto would apply in respect to almost any act reprehensible in itself, or forbidden by state statutes, and supposed injuriously to affect freedom, honesty, or integrity of an election."

Appellant contends, therefore, that the convictions under the Information as laid cannot stand as to Counts 9 and 20.

To sentence a man for the violation of a law which has ceased to exist presents a jurisdictional question and dictates a reversal. To send a man to jail or to require him to pay a fine in such an instance is cognizable neither under our law nor justifiable under the procedure. The construction placed upon its own acts by the Congress is one of the most persuasive factors in this entire argument, The Congress realized that the Emergency Price Control and the Stabilization Acts were both dead and provided that no effort should be made to hold a man responsible or to prosecute him for anything which happened after June 30, 1946.

There was a hiatus because of this period of twenty-five days and there was no revival, no extension, no reenactment of the old law which could bridge the chasm and render a man liable for any conduct after June 30, 1946, under the old laws.

The opinion of the Circuit Court cites *United States v. Stafoff*, 260 U. S. 477, 480, dealing with three separate cases involving alleged violations of certain sections of the Revised Statutes which had been repealed by the National Prohibition Act but which were revived by the Supplementary Prohibition Act of November 23, 1921. In considering the circumstances in the *Stafoff* case this Court said: "The decision in Stafoff's case dealt with conduct before the date of the Supplemental Act and was right."

Had the conduct mentioned in Counts 9 and 20, of the information in the case at bar, involved acts prior to July 25, 1946 (except, of course, any committed during the period immediately prior to that date saved in the exception in the Act of July 25, 1946) the *Stafoff* decision would be binding. But that is not the situation here.

Later in that opinion on page 480 the Court considered the facts in *Brooks v. Remus*, and announced the law which we assert is controlling here when it said: "The indictment plainly purported to be drawn under the old law and it would be unjust to treat the conviction as covering an offense under a fundamentally different policy if facts could be spelled out that might fall within the latter, although alleged with no thought of it or any suggestion to the accused that he must be prepared to defend against the different charge."

We maintain that this opinion justifies our position for two reasons: 1. That the conduct here complained against was subsequent to the passage of the Act of July 25, 1946, and, therefore, not a violation of the earlier statute which had been permitted to expire; and, 2. The information "plainly purported to be drawn under the old law". The prosecution here was under the old law. Petitioner was convicted under that law although it was not revived but had been supplemented by a new Act which picked up many of its provisions and gave them life.

Nor do we agree that *United States v. Powers*, 307 U. S. 214, constitutes authority for the affirmance of the judgment here. In that case the statute in question was to have expired on June 16, 1937. "But it nexer expired, for on

June 14, 1937, the whole Act was continued in effect until June 30, 1939."

In this case the law did expire. It had been dead for 25 days when the Price Control Extension Act of July 25, 1946, was enacted. While in the *Powers* case violations subsequent to June 14, 1937, were properly subject to the prosecution because the law "never expired", the reasoning does not apply there.

Maryland v. Soper, 270 U. S. 9, is cited to sustain this same idea in the Circuit Court's decision. In that case this Court referred to the provision of the Willis-Campbell law, the Act of November 23, 1921, which amended The National Prohibition Act. The Court speaks of the Willis-Campbell Act as making clear the criminality of certain conduct under the revenue laws. Thus we should consider only the Price Control Extension Act of 1946 as being the statute which we are concerned with rather than the one which was dead.

Likewise in the case of *De Melia v. Bowles,* 142 Fed. 2d 725, the Second War Powers Act was amended on December 20, 1944, so as to substitute in the date when it was to expire the figure "1945" for "1944". Thus before the date of its expiration which was to have been December 31, 1944, and while it was in force, that act was amended so as to extend its terms.

But no such condition obtained here. The 1942 Act was permitted to expire. A new Act was passed 25 days later which made the provisions of the old act a part of the new law. Whatever force and effect these clauses now possess are drawn from the new act and are for all purposes "new" law. They are not to be considered as effective because of an act of Congress passed years before and whose provisions have lost their effectiveness through the expiration of the term of the Act—without any action taken during its lifetime to extend it.

In *United States v. One Ford Coupe,* 272 U. S. 321, this Court again dealt with the question of whether the Willis-Campbell Act of 1921, insofar as it concerned relief from the payment of taxes on illicit liquor, was in conflict with a law which forbade the manufacture of illicit liquor. There

again the Court dealt with the effect of the provisions of the new act—the Willis-Campbell Act of November 23, 1921—just as we should here deal with the Price Control Extension Act of July 25, 1946.

Our contention is definitely justified in *Wainer v. U. S.*, 299 U. S. 92, where, in dealing with the same question the Court said that certainly the Willis-Campbell Act was passed to reenact all revenue acts which had been in force when the National Prohibition Act was passed save such as were in direct conflict with the Prohibition Act. The use of the word *"reenact"* makes our point.

The Price Control Extension Act of July 25, 1946, *reenacted* most of the provisions of the dead Emergency Price Control Act of 1942. And when *reenacted* those provisions breathed by virtue of the 1946 Act.

In the case of *Porter v. Shibe*, 158 Fed. 2d 68, the same Circuit Court of the Tenth Circuit held, as in this case, that the Price Control Act of 1946 extended the Emergency Price Control Act of 1942, as amended, and that Congress intended to make acts and regulations promulgated thereunder retroactive to June 30, 1946.

We assert that those regulations derive their force and effect from the new act, not from the one which expired.

We say that the new act did not revive or extend the Emergency Price Control Act. It simply picked up some of its provisions and reenacted them and gave them effect.

THE SAVING CLAUSE IN THE EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED, DOES NOT JUSTIFY PROSECUTION UNDER COUNT 1.

The Circuit Court disposed of this portion of Petitioner's argument with the statement that "Although the Emergency Price Control Act of 1942 expired by its terms on June 30, 1946, it remained in force after that date for the purpose of sustaining any proper suit, action, or prosecution with respect to any offense committed, or any right or liability incurred prior to that date, by virtue of the saving clause in Sec. 1 (b) of such Act. Such saving clause

embraced prosecutions commenced after June 30, 1946, offenses committed prior to that date.

Petitioner contends that the Emergency Price Control Act of 1942, as Amended, ceased to have any existence or any validity because by its terms it was bound to terminate either on June 30, 1946, or upon the date of a proclamation of the President, or upon the date specified in a concurrent resolution of the Congress, "whichever date is the earlier."

Neither the President nor the Congress had acted when June 30, 1946, rolled around. This converted June 30, 1946, into the "earlier date", so that the Act ceased to be operative on that date by the limitation contained in its own terms.

Therefore, any effort to prosecute now for any violation prior to June 30, 1946, fails because of such expiration of the statute unless there was a saving clause contained in the Act which permitted such prosecution.

Subsection (b) of Section 901, Title 50 Appendix, U.S.C.A. contains the provisions as to such termination and also a saving clause with which we may be concerned here.

The first portion of subsection (b) which deals with its termination reads:

> "(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1946, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, order, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

We contend therefore that the Emergency Price Control Act of 1942, as Amended, and the Stabilization Act of 1942, as Amended, died on June 30, 1946.

The law was enacted to meet an emergency and Congress provided that the law should continue to be operative only for a specified term. If it is agreed that the saving clause which is contained in Subsection (b) has not the effect claimed for it here, then we are referred to the general saving clause contained in Title 1, Section 29, which reads:

> "Par. 29. Repeal of statutes as effecting existing liabilities.
>
> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of *sustaining any proper action or prosecution* for the enforcement of such penalty, forfeiture, or liability. As amended Mar. 22, 1944, c. 123, 58 Stat. 118."

Before Section 29 of Title 1 could become effective then, there must be a repeal of a statute as distinguished from a statute which expires by its own terms.

It is to be noted that the general statute, Title 1, Section 29, contains somewhat the same language as that used in the saving clause in the Emergency Price Control Act of 1942 as amended, but they are not identical. However, the word "sustaining" is used in the same general sense in the last words of the two quoted clauses.

In a case decided by the Sixth Circuit Court of Appeals on January 13, 1947, it was contended that since cotton

quotas were suspended for the 1943-1944 marketing years and were not thereafter renewed, certain penalties were not recoverable under the Agricultural Adjustment Act. There was no saving clause in that Act. The Court, in finding against the Petitioner's contentions regarding the recovery of the penalties, said:

> "—This conclusion is not compelled and gains nothing from the Act of March 22, 1944, Title 1 U.S.C.A., Par. 29, which, in effect, imports a 'saving clause' into every repealed statute providing for a penalty, forfeiture or liability unless precluded by the terms of the statute itself. Section 29, prescribing a rule differing from that of the common law, must be strictly construed and limited to repealed statutes. United States v. Hark, D. C. Mass., 49 F. Supp. 95, reversed on other grounds, 329 U. S. 531, 64 S. Ct. 359, 88 L. Ed. 290."

Rodgers v. United States, 158 Fed. 2d 835.

The Emergency Price Control Act of 1942, as amended, has not been repealed, and hence we are confronted with the question whether Title 1, Section 29, as amended March 22, 1944, is applicable. Whether Title 1, Section 29, as amended, is applicable may become a secondary question in view of the use and meaning of the word "sustaining".

Webster's International Dictionary defines the word "sustaining" to mean "maintaining".

In *Words and Phrases,* Permanent Edition, Volume 40, at pages 931 and 932, and Volume 26 at pages 57 to 61, we find:

> "Sustain
>
> "The word 'sustain' may be susceptible of several constructions and has been defined as to mean to carry on or to maintain, which is the general meaning of the term. *George v. Connecticut Fire Ins. Co.,* 201 P. 510, 512, 84 Okl. 172, 23 A.L.R. 80."
>
> "The word 'maintain' signifies literally 'to hold by the hand'; hence, in ordinary use, 'to uphold; to sustain; to keep up'; while in pleading it is defined to mean 'to support what has already been brought

into existence'; so that where a foreign corporation began an action before it was authorized it could maintain the same action after a subsequent authorization. *Carlson-Rand Co. v. Stern,* 31 S. W. 772, 773, 192 Mo. 381, 32 L.R.A. 420, quoting Anderson's Law Dict.

"To 'maintain' an action is not the same as to commence an action, but it implies that the action has already been commenced. The verb 'maintain' in pleading has a distinct technical sifinification. It signifies to support what has already been brought into existence. *Roullard v. Gray,* 38 Cal. App. 79, 175 P. 479.

" 'Maintain', in pleading has a distinct technical signification. It signifies to support what has already been brought into existence. Thus a defendant who admits the right of plaintiff to bring, or to bring and up to the last pleading maintain, his action, but relies on matter disabling him from further proceeding, insists that plaintiff ought not by reason of such matter further to maintain his action. A plea in bar of the further maintenance of the action admits the plaintiff to have properly maintained it up to the time of the plea. *Moon v. Durden,* 2 Welsb. H. & G. 22, 30."

Mr. Justice Holmes defines "maintain" in *Smallwood v. Gallardo,* 275 U. S. 56, 72 L. ed. 152, as "To maintain a suit is to uphold, continue on foot and to keep from collapse a suit already begun."

In the case of *Garner v. Mengel Co.,* reported in 50 Fed. Supp. 794, from the District Court of the western district of Kentucky, Miller, Judge, said:

"The Supreme Court of the United States has twice held in construing the word 'maintained' in a Federal statute that 'to maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun.' Smallwood v. Gallardo, 275 U. S. 56, 48 S. Ct. 23, 72 L. Ed. 152; George Moore Ice Cream Co. v. Rose, 289 U. S. 373, 53 S. Ct. 620, 77 L. Ed. 1265. It has also been held in the following cases that there is

a well defined distinction between beginning and maintaining an action and that using the words in their ordinary significance 'maintain' carries a different meaning from 'institute' or 'begin,' and implies that an action must be begun before it can be maintained: In re Charles Nelson Co., D. C., 294 F. 926, 928; Carson-Rand Co. v. Stern, 129 Mo. 381, 31 S. W. 772, 32 L.R.A. 420; National Fertilizer Co. v. Fall River Five Cent Savings Bank, 196 Mass. 458, 82 N. E. 671, 14 L.R.A., N. S., 561, 13 Ann. Cas. 510; Roullard v. Gray, 38 Cal. App. 79, 175 P. 479; Friel v. Alewel, 318 Mo. 1, 298 S. W. 762, 764."

When Congress enacted the Price Control Extension Act of 1946 it recognized a distinction between these terms in Section 12(d) where it was said, "*The administrator may not institute any action under this subsection on behalf of the United States* * * *" and, thereafter, in the same subsection said, "*The administrator shall not institute or maintain any enforcement action under this subsection* * * *". (Italics added.)

Clearly, the Congress itself distinguished between the institution and the maintenance of an action. Otherwise, there would have been no reason for the use of both words in the same sentence to take care of problems which existed or which might arise.

Therefore, under the terms of the saving clause, in the Act and the plain, everyday meaning of the words employed therein by the Congress, the Information as to Count 1 deals with conduct prior to the expiration of the Act on June 30, 1946, and cannot stand.

Admittedly statutory liabilities may be preserved by saving clauses. But such saving clauses must be couched in language which will provide for and justify such saving. The general rule is that penal statutes are to be construed strictly in favor of the defendant and saving clauses attempting to preserve penalties under statutes which have expired or have been repealed must be construed strictly against the survival of the penalty.

The provisions of the attempted saving clauses must be carefully scrutinized and must not be constructed to pre-

serve only liabilities beyond the preservation which the legislature manifestly intended.

59 Corpus Juris, Pages 1195-6.

In *United States v. Auerbach,* 68 Fed. Supp. 776, the District Court there dealt with the meaning of the word "sustain" in the saving clause quoted above. The Court refused to take the meaning of the word "sustain" as contended for in a motion to dismiss and definitely held against the argument of the appellants.

The value of that decision is somewhat lessened, however, by the following paragraph after the Court refused to accept the interpretation of the word "sustain" offered by the appellants:

> "It is tied in, however, with the word 'proper,' and the question becomes, what is a 'proper' suit, action or prosecution. I think that what Congress intended, looking alone at the Act as it existed before June 30, 1946, was that any defense was available to anyone who might be proceeded against after the expiration of the Act, *except the defense that the action was not started before June 30, 1946.*"

With this conclusion we definitely disagree and still maintain that the interpretation which we seek to give the word should be accepted as the true one.

Another case coming from the Federal Court, for the District of Oregon, contains language which questions the ability of the Congress to do what the government here claims was accomplished by the Congress under the terms of the Act of July 25, 1946. Judge McColloch said *(United States v. Evans,* Jan. 10, 1947 (——Fed. Supp.——) (15 Law Week page 2122)):

> "Congress could not, in my opinion, blow the breath of life into thousands of regulations and orders, as it endeavored to do on July 25th last, when it 'amended' the Price Control Act 'as of June 30th.'
>
> "Aside from this 'pig in a poke' method of legislating, which certainly would be unconstitutional under State Constitutions, the principle of division of

federal powers is violated, it seems to me, if we say that Congress can make law, what was merely order and regulation before, keeping in mind that the orders and regulations were of varied character—legislative, executive, judicial.

"Certainly there is serious doubt of the legality of the bizarre procedure which was adopted, a doubt which defendants in criminal cases are entitled to have resolved in their favor."

CONCLUSION.

Petitioner respectfully submits that the question should be determined whether the Emergency Price Control Act of 1942, as amended, was actually extended or if it expired by its own terms and the controlling law after July 25, 1946, was the law in August of that year. When this is determined, then the last two counts on which Petitioner was convicted are disposed of.

We respectfully submit that the saving clause under the Act of 1942, did not justify conviction under Count 1 of the Information.

We respectfully pray for the issuance of the Writ of Certiorari to the end that Petitioner may present his argument more thoroughly than is possible under the time allowed for this application.

Respectfully submitted,

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